No. 93-93

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROANOKE RIVER BASIN ASSOCIATION, PETITIONER

v.

RONALD E. HUDSON, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In determining whether the position of the United States was substantially justified for purposes of an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412, whether the court should consider the overall position of the United State in the action, rather than its position on each individual issue as to which it did not prevail.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-29a, is reported at 991 F.2d 132. The district court's opinion (Pet. App. 30a-36a) is unreported. The prior opinions on the issues underlying this attorney's fees case are found at 940 F. 2d 58; 731 F. Supp. 1261; and 665 F. Supp. 428.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. The petition for a writ of certiorari was filed on July 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), provides, in relevant part, that:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party * * * fees and other expenses * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Act was amended in 1985 to provide that the phrase the "position of the United States" means "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based" (28 U.S.C. 2412(d)(2)(D)).

This case arises from the denial of petitioner's application for EAJA attorney's fees in connection with its intervention in a challenge by the State of North Carolina to the U.S. Army Corps of Engineers' decision to issue a permit to, and to execute a contract with, the City of Virginia Beach, Virginia. The permit allows the construction of a water intake facility and pipeline to bring water from Lake Gaston on the Virginia-North Carolina border to Virginia Beach. The contract allows Virginia Beach to store water in Kerr Reservoir, upstream of Lake Gaston. The denial of fees was based on the finding that the position of the United States was substantially justified.

2. a. On January 12, 1984, the State of North Carolina filed suit in the Eastern District of North Carolina against various officials of the Corps of Engineers and the Department of the Army. District Court Clerk's Record (CR) 1. The State claimed, in relevant part, that the Corps had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, since it had not prepared an Environmental Impact Statement

(EIS), and that it had violated its public interest review regulations by arbitrarily and capriciously determining that Virginia Beach had a legitimate need for the water.[1] 665 F. Supp. at 431. On June 20, 1984, petitioner, eight counties in North Carolina, and four counties in Virginia were allowed to intervene as plaintiffs. CR 22. Petitioner's complaint in intervention claimed, in relevant part, that the Corps had violated NEPA by failing to prepare an EIS (C.A. App. 31-37), and by arbitrarily determining that Virginia Beach needed an autonomous water source (*id.* at 42-44).[2]

b. In July 1987, the district court upheld the Corps' decision against all but two of the many challenges. *North Carolina* v. *Hudson*, 665 F. Supp. 428. The district court found that the Corps should not have relied on Virginia Beach's analysis of the effect of the project on striped bass[3] without conducting an independent analysis (*id.* at 442-443). The court also found that the Corps had failed to address sufficiently the extent of the public need for the project. *Id.* at 446-447. Accordingly, the district court remanded the matter to the Corps: (1) to "make an independent assessment of the effects of the proposed project on striped bass to determine whether * * * an EIS is required or whether any mitigative measures are

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[1] The State's fifteen-count complaint also alleged violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*; the Federal Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*; and the Water Supply Act of 1958, 43 U.S.C. 390b-390f.

[2] Petitioner's complaint also alleged violations of the Clean Water Act and the Water Supply Act.

[3] Every spring, striped bass migrate up the Roanoke River to Weldon, N.C., which is downstream of Lake Gaston, to spawn. The Corps, in cooperation with other entities, augments the flow of the river during the spawning period in order to maintain a fixed minimum water level on the river gauge at Weldon. See 731 F. Supp. at 1264.

necessary; and (2) [a]s a part of its public interest review [, to] make a determination of the extent of Virginia Beach's water needs." *Id.* at 450.

c. On remand, the Corps conducted a 17-month investigation of those issues. The final Supplemental Environmental Assessment (SEA) prepared by the Corps concluded that the water withdrawal allowed by the permit would have no impact, let alone a significant impact, on the spawning of striped bass. 731 F. Supp. at 1264.[4] Out of an abundance of caution, the Corps nevertheless required, as a condition of the City's permit, that it use the water stored in the Kerr Reservoir to eliminate "the loss of any augmented spawning flow days which would otherwise be caused by the City's withdrawal." *Id.* at 1265-1266. As to the extent of the need for water, the Corps evaluated the available data and additional submissions, and concluded that the City needed at least the 60 million gallons per day that the permit would authorize. *Id.* at 1266.

d. The district court upheld the Corps' decision on remand based on the supplemental record. *North Carolina* v. *Hudson*, 731 F. Supp. 1261 (1990). The court of appeals affirmed. *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58 (1991). This Court denied a petition for a writ of certiorari on February 24, 1992. 112 S. Ct. 1164.

3. a. Petitioner filed a petition for an award of attorney's fees and expenses under EAJA, seeking more than

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[4] The 1983 Environmental Assessment had found, on the basis of Virginia Beach's submission, that the project would cause the loss of the last spawning day once every four years. 731 F. Supp. at 1264. By contrast, the SEA found that the project would cause a loss of the last day of augmented spawning flows in one out of every seven years. *Ibid.* The SEA found that evidence indicated that the depletion of striped bass was primarily the result of overfishing, and that spawning was not affected by fluctuations in the rate of flow in the river. *Id.* at 1265.

$188,000 in attorney's fees and more than $6,000 in expenses, based on its work on the two issues that were remanded to the agency.[5] The government argued in response that petitioner was not a prevailing party (C.A. App. 212-214, 217-218),[6] and that, in any event, the government's position was substantially justified (*id.* at 214-217, 219). It also argued that special circumstances made an award of fees unjust.[7]

b. Following the February 24, 1992, denial of petitioner's petition for certiorari seeking review of the merits, the district court denied the petition for EAJA fees and expenses. The court rejected the government's assertion that petitioner had not prevailed on the NEPA issue, noting that following remand, "the Corps added a

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[5] The petition was filed on March 5, 1990, and supplemented on August 8, 1990, to include work preparing the petition. C.A. App. 165, 378. By order dated December 13, 1990, the district court stayed consideration of the petition, finding it premature, since no final judgment (as that term is used in EAJA) had been reached. C.A. App. 391.

[6] The government asserted that petitioner did not prevail on the NEPA issue, since its primary contention had been that the Corps was arbitrary and unreasonable in deciding not to prepare an EIS prior to issuing the permit, a decision the district court ultimately upheld. C.A. App. 212-214. The government also contended that petitioner did not prevail on the issue related to Virginia Beach's need for water. Petitioner had challenged the City's need for an "autonomous" water source, but that need was never questioned by the district court. The court only remanded the question of the *extent* of the need. C.A. App. 217-218.

[7] The government pointed out that petitioner had raised some 27 issues, many of which were frivolous and misleading. Petitioner's pleading nevertheless required substantial effort on the part of the Corps in response. C.A. App. 228; Appellee's C.A. Br. 11-12 n.8. The statement at Pet. 9 that the government acknowledged on appeal that it had not contended that any special circumstances existed that would make an EAJA award unjust is accordingly incorrect.

mitigation measure to lessen the pipeline's impact on striped bass." Pet. App. 33a. However, the court found the government's position to be substantially justified, "[i]n light of the magnitude of the project, the Corps' significant tasks under relevant environmental statutes and regulations, and the Corps' overall 'careful analysis of the environmental and nonenvironmental facts'" (*id.* at 36a).

c. The court of appeals affirmed. Relying on this Court's decision in *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), the court rejected petitioner's claim that the district court should have considered the government's position on each issue as to which it lost in isolation from the government's position as a whole. Rather, it concluded (Pet. App. 22a):

> when determining whether the government's position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation. In doing so, it is appropriate to consider the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them.

ARGUMENT

The decision of the court of appeals is correct and fully consistent with the decisions of this Court, including *Commissioner, INS* v. *Jean*, 496 U.S 154 (1990). The decision does not conflict with the holding of any court of appeals decision rendered after the enactment of the congressional amendment defining the term "[the] position of the United States." Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 12, 18, 20-21) that the court of appeals' decision is inconsistent with *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). *Hensley*, however, did not involve the Equal Access to Justice Act, and hence the *Hensley* Court did not consider the issue in this case—whether, in determining under EAJA whether the position of the United States was substantially justified, a court should evaluate the entire position of the United States, rather than only individual issues as to which the government lost. The question presented in *Hensley* was the entirely different one of "whether a partially prevailing plaintiff may recover an attorney's fee [under 42 U.S.C. 1988] for legal services on unsuccessful claims." 461 U.S. at 426. As to that issue, the Court held that the level of a plaintiff's success on individual issues is relevant in determining the amount of fees to be awarded under Section 1988. *Id.* at 435-436.[8]

Petitioner suggests that the court of appeals' decision is inconsistent with *Hensley* because *Hensley* decided that "a 'partially prevailing party' may recover fees and expenses to the extent that the party prevails * * * [and that] [i]t would be contrary to the teachings of *Hensley* to deny fees to a partially prevailing party because the Government prevailed on other issues." Pet. 20-21. But *Hensley*—which arose under the attorney's fee provision of the Civil Rights Act, 42 U.S.C. 1988—did not hold, as petitioner suggests, that a partially prevailing party may collect fees under EAJA to the extent that that party prevails. EAJA, unlike Section 1988, provides that fees are to be awarded only when the position of the United States was not substantially justified. *Hensley*

[8] The district court recognized that *Hensley* is relevant to the issue of whether petitioner was a prevailing party in this case (Pet. App. 32a), an issue that the court of appeals found it unnecessary to consider (*id.* at 16a n.5, 27a).

did not address this EAJA requirement, much less write it out of EAJA.

In any event, the court of appeals did not hold in this case that a partially successful party may not collect fees simply because the United States was substantially justified on other issues. Rather, it held that, in assessing whether the position of the United States was substantially justified, a court looks beyond the issues on which the fee applicant prevailed and determines from the totality of the circumstances whether the government acted reasonably. The court explained (Pet. App. 22a):

> Thus a more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's "position" in the entire case as unreasonable, whereas a totally insupportable and clearly unreasonable position by the government on an inconsequential aspect of the litigation might not.

The court of appeals' case-by-case approach to assessing whether the position of the United States is substantially justified is entirely consistent with *Hensley*.

2. Petitioner suggests (Pet. 10, 12, 15-16, 21-22 n.6) that the court of appeals' decision is inconsistent with *Commissioner, INS* v. *Jean*, *supra*. To the contrary, however, the decision is a faithful application of this Court's rationale in *Jean* to the circumstances of this case.

At issue in *Jean* was "the application of the 'substantially justified' condition." 496 U.S. at 158. The question in *Jean* arose in the context of an application for attorney's fees for work on the attorney's fee application. This Court resolved the question of whether another determination as to substantial justification need be made as to the government's position on the attorney's fees application by looking to the language and the

legislative history of EAJA's definition of "position of the United States." This Court held that the use of the singular word "position" to identify both the litigating posture and the underlying agency action, and the use of the singular in requiring that an application show "that the position of the United States was not substantially justified" indicate "that only one threshold determination for the entire civil action is to be made" of that position. 496 U.S. at 159-160. The Court also noted that the legislative history of EAJA suggests a single determination of substantial justification: "Congress' emphasis on the underlying Government action supports a single evaluation of past conduct." *Id.* at 159 n.7, citing H.R. Rep. No. 992, 98th Cong., 2d Sess. 9, 13 (1984); S. Rep. No. 586, 98th Cong., 2d Sess. 10 (1984); and H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). Accordingly, the Court held that "[t]he single finding that the Government's position lacks substantial justification, like the determination that a claimant is a prevailing party," operates as a one-time threshold for fee eligibility. 496 U.S. at 160. "The 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation." *Id.* at 165. The court of appeals' holding in the instant case that a court should look to the government's position in its totality, not in isolation to each issue as to which the government did not prevail, is fully faithful to this Court's analysis of the language and legislative history of EAJA's definition of the "position of the United States." A contrary holding would have been inconsistent with the rationale of *Jean*.

3. Petitioner concedes (Pet. 11 n.1) that "no other court has articulated the issue presented here precisely as did the court below" but, nevertheless, claims (Pet. 11, 18-19) that the court of appeals' decision is inconsistent

with *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983), and *Matthews* v. *United States*, 713 F.2d 677, 683 (11th Cir. 1983).[9] *Goldhaber* and *Matthews* do appear to hold that the substantial justification evaluation must be performed on an issue-by-issue basis.[10] However, both cases were decided prior to the 1985 amendments to EAJA that added the definition of the "position of the United States" to the statute. No court of appeals since then has followed the approach of those early decisions.

Indeed, in post-amendment cases, the Third Circuit has clearly recognized that the question of substantial justification is a question as to the "agency's position viewed as a whole." *Brinker* v. *Guiffrida*, 798 F.2d 661, 664 (1986); *Taylor* v. *Heckler*, 835 F.2d 1037, 1040 (1987). In *Myers* v. *Sullivan*, 916 F.2d 659, 666 n.5 (1990), and *Hudson* v. *Secretary of Health & Human Services*, 839 F.2d 1453, 1456 n.2 (1988), the Eleventh Circuit also acknowledged that the "position of the United States" encompasses an evaluation of both the agency's prelitigation conduct and the subsequent litigation position of the Justice Department. That court has also stated in dicta, however, that "[u]nless the government can establish that *all* of its positions were substantially justified, the

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[9] Petitioner notes (Pet. 19 n.4) that the court of appeals did not mention these cases in its opinion, and attributes this failure to a blind following of the district court's decision. But petitioner referred to these two cases only once in the court of appeals: in its opening brief as the eleventh and twelfth cases in a string citation to thirteen cases.

[10] Petitioner claims (Pet. 11 n.1) that a number of courts have followed the analysis set forth in *Goldhaber* and *Matthews*. None of the other cases cited by petitioner supports its claim that a court is required to analyze the government's position on each issue as to which it did not prevail and make a separate, isolated determination as to whether the position on each issue was substantially justified.

claimant is entitled to receive attorney's fees." 916 F.2d at 666 n.5 (emphasis in original); accord 839 F.2d at 1456 n.3. That statement does not unambiguously indicate whether *each* position is to be considered in isolation or *all* positions are to be evaluated as a whole.[11] In light of this Court's analysis in *Jean*, it is far from clear how the Eleventh Circuit would interpret those dicta, or whether it would adhere to them, if it were to consider the issue presented to the court below. Thus, there is no current conflict in holdings among the circuits as to this issue, and no present need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] *Hudson* relies for this statement on *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489 (11th Cir. 1986), and *Myers* relies on *Hudson*. In *Haitian Refugee Center*, the court found that "assuming the government was correct as to the due process and equal protection issues, it was patently unreasonable to carry on this litigation when the plaintiffs were entitled to relief under an alternative basis." 791 F.2d at 1499-1450. The court thus looked at the government's position as a whole; it found that the government's substantial justification as to some issues did not, in that case, make its position as a whole substantially justified. The analysis in *Haitian Refugee Center* is entirely consistent with that of the court below.